Supreme Court, U.S.
FILED
MAY 21 1997
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No. 96-1494

In the Supreme Court of the United States

OCTOBER TERM, 1996

ALCAN ALUMINUM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
DAVID C. SHILTON
MICHAEL J. MCNULTY
JOHN T. STAHR
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Congress's definition of "hazardous substance" in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601(14), should be interpreted to include a minimum threshold concentration requirement.

2. Whether CERCLA's requirement that the release of waste at a disposal site "cause[] the incurrence of response costs," 42 U.S.C. 9607(a), should be interpreted to require an additional showing that each individual company's hazardous substances independently caused the response costs to be incurred.

3. Whether the court of appeals correctly held that petitioner had failed to demonstrate that the harm from the release is capable of reasonable apportionment, where petitioner declined to introduce any evidence regarding that factual inquiry.

4. Whether the court of appeals erred in applying CERCLA's liability provision, 42 U.S.C. 9607(a), retroactively to petitioner's conduct.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A102-A104) is unpublished, but the decision is noted at 96 F.3d 1434 (Table). The opinion of the district court (Pet. App. A50-A74) is reported at 892 F. Supp. 648. The earlier opinion of the court of appeals remanding the case to the district court (Pet. App. A4-A49) is reported at 964 F.2d 252. The initial decision of the district court (Pet. App. A1-A3) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 22, 1996. Pet. App. A104. A petition for rehearing was denied on December 16, 1996. Pet. App.

A105-A106. The petition for a writ of certiorari was filed on March 14, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, to address the severe environmental and public health effects caused by releases of hazardous substances, especially at abandoned and inactive waste disposal sites. H.R. Rep. No. 1016, 96th Cong., 2d Sess., Pt. I, at 22 (1980). As amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, CERCLA empowers the Environmental Protection Agency (EPA) to undertake response actions to clean up hazardous substance sites. 42 U.S.C. 9604(a); 26 U.S.C. 9507.[1] EPA can then recover the response costs it incurred from the parties responsible for the hazardous waste disposal through a cost recovery action. 42 U.S.C. 9607(a).[2] Responsible parties include

> any person who by contract, agreement, or otherwise arranged for disposal or treatment * * * of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and * * * from which

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[1] CERCLA grants authority to the President, who has delegated various powers to the Administrator of EPA. See Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).

[2] Alternatively, EPA can seek an administrative or judicial order requiring the responsible parties to undertake response actions themselves. 42 U.S.C. 9606(a).

> there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

42 U.S.C. 9607(a)(3) and (4).

Under CERCLA, responsible parties are liable for "all costs of removal or remedial action incurred by the United States Government * * * not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(A).[3] CERCLA thus imposes strict liability on responsible parties, subject only to three limited defenses. See 42 U.S.C. 9601(32), 9607(b); Pet. App. A14. Where there are multiple responsible parties who contribute hazardous waste to a site, courts have held that joint and several liability applies. See *id.* at A32-A33.

2. This litigation arises from EPA's cleanup of contamination at the Butler Tunnel site, located on the east bank of the Susquehanna River in Pittston, Pennsylvania. Pet. App. A7-A8. From 1978 to 1979, several liquid waste transport companies collected oily liquid wastes from industrial facilities and disposed of them at the Butler Tunnel site. *Id.* at A8.

Petitioner manufactures aluminum sheet and plate products. Petitioner's production process for aluminum ingots created an emulsion consisting of approximately 95% deionized water and 5% mineral oil. The emulsion also contained fragments of aluminum ingots, which are comprised of various metals such as copper, chromium, cadmium, lead, and zinc. Those metals are hazardous substances under CERCLA. Pet. App. A8-A9; 42 U.S.C. 9601(14). From 1978 to 1979, petitioner contracted with a liquid waste trans-

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[3] The national contingency plan prescribes methods for undertaking removal and remedial actions. See 40 C.F.R. Pt. 300.

port company to dispose of 2.3 million gallons of the emulsion. Pet. App. A9. At least 32,500 gallons of petitioner's emulsion were dumped at the Butler Tunnel site. *Ibid.* Petitioner's emulsion was commingled with other oily liquid wastes disposed of at the same site. See *id.* at A54; C.A. App. 49, 51, 58, 59.

In September 1985, in the wake of Hurricane Gloria, approximately 100,000 gallons of waste contaminated with hazardous substances were released from the Butler Tunnel site into the Susquehanna River, creating a 50-mile long oily sheen on the River. Pet. App. A10. EPA's response efforts resulted in the removal and disposal of more than 80 tons of oil and chemical-soaked debris and soil from the River. *Id.* at A54. The waste oils that EPA removed included the hazardous substances cadmium, chromium, copper, lead, and zinc. *Ibid.*

3. In November 1989, the United States filed suit under CERCLA against twenty defendants, including petitioner, to recover response costs totaling $1,302,290. The United States subsequently entered into consent decrees with all of the defendants except petitioner. Pet. App. A54-A55. The settling defendants agreed to pay $828,500 in response costs and to conduct further response actions, including a remedial investigation/feasibility study to identify additional cleanup actions. See *id.* at A10-A11, A55; Towle Decl. ¶¶ 21-22, 31-32 (C.A. App. 210, 213).

The United States moved for summary judgment against petitioner to recover the remainder of its response costs. Petitioner cross-moved for summary judgment, asserting that its emulsion did not constitute a "hazardous substance" because the metals in the emulsion were at below-ambient levels. Pet. App. A11. Petitioner also asserted that its emulsion could

not have "caused" the release or the incurrence of any response costs. *Ibid.* On May 8, 1991, the district court granted the United States' motion for summary judgment, holding petitioner jointly and severally liable. *Id.* at A1-A3.

The court of appeals affirmed in almost all respects. Pet. App. A4-A38. The court held that CERCLA's definition of "hazardous substance," by its plain language, contains no quantitative threshold requirement. *Id.* at A14-A19. The court also rejected petitioner's causation argument, holding that the United States need demonstrate only that a particular defendant's hazardous substances were deposited at a site from which there was a release or threatened release, and that the release or threatened release caused the incurrence of response costs. *Id.* at A24-A29.

The court of appeals remanded, however, to provide petitioner the opportunity to limit its liability by showing that the harm from its emulsion, although commingled with the other wastes disposed of at the site, is capable of reasonable apportionment. Pet. App. A30-A37. Applying the Restatement (Second) of Torts, the court ruled that petitioner could "avoid liability otherwise established" by demonstrating that there are distinct harms or that there is a reasonable basis for determining the contribution of each cause to a single harm. *Id.* at A33-A35. The court stated that "the analysis will be factually complex as it will require an assessment of the relative toxicity, migratory potential and synergistic capacity of the hazardous waste at issue." *Id.* at A35. The court concluded that "if [petitioner] proves that the emulsion did not or could not, *when mixed with other hazardous wastes*, contribute to the release and the

resultant response costs, then [petitioner] should not be responsible for *any* response costs." *Id.* at A37.

4. On remand, petitioner presented no evidence and declined an opportunity for a hearing on whether its emulsion, when mixed with other hazardous substances at the site, contributed to the release and the resultant response costs. Nor did petitioner address the factual inquiries identified by the court of appeals regarding the characteristics of its emulsion when commingled with other wastes. Pet. App. A51. Rather, petitioner reiterated its argument that it is not liable because its emulsion with below-ambient levels of metals could not cause environmental harm and because EPA did not direct its response actions specifically toward metals. *Id.* at A51-A52.

In June 1995, the district court granted summary judgment to the United States. Pet. App. A50-A74. The court rejected petitioner's contention that its liability should be determined by looking at the metal constituents alone, rather than at the emulsion as a whole. *Id.* at A58-A61. The court found that petitioner "has presented neither evidence nor argument that its used emulsion is environmentally benign," *id.* at A61, and, in fact, "conceded that it cannot prevail on its summary judgment motion if the hazardous substance of concern is the used emulsion itself," *id.* at A59. The district court further found that petitioner "has not compared the chemical composition of its used emulsion to other wastes dumped into the [site]"; has not addressed "whether its used emulsion could have reacted with the other oily wastes"; and has not addressed "the likely products of any chemical reactions." *Id.* at A64-A65. Instead, petitioner premised its entire argument on its "all or nothing" contention that its emulsion contains below-ambient

levels of metals, which allegedly could not cause environmental harm and which allegedly were not specifically targeted by EPA's response actions here. *Id.* at A65.[4]

5. Petitioner appealed. Following the completion of briefing and shortly before oral argument, petitioner filed a motion in the court of appeals to dismiss EPA's action for lack of jurisdiction. Petitioner contended for the first time that CERCLA cannot be applied retroactively to require it to pay for the cleanup of hazardous substances that were disposed of prior to CERCLA's enactment in December 1980. The United States opposed the motion on the grounds that petitioner had waived the argument and that, in any event, CERCLA's response cost liability provision is retroactive. On August 22, 1996, the court of appeals, "[a]fter considering the contentions raised by [petitioner]," issued a judgment order affirming the district court. Pet. App. A102-A104.

ARGUMENT

Petitioner seeks review of issues of statutory interpretation under CERCLA and of factual determinations regarding petitioner's contribution to the harm at the Butler Tunnel site. The rulings of the court of appeals are correct, do not conflict with any decision of this Court or any other court of appeals, and raise no issue warranting review by this Court.

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[4] In the course of denying petitioner's motion for reconsideration, the district court observed that, "[b]ecause it is undisputed that the entire 'hazardous soup' that discharged into the Susquehanna River was remediated, and [petitioner's] emulsion was one of the ingredients of this oily stew, it is incorrect to say that the response action was not directed at the emulsion." Pet. Supp. App. A3.

1. a. Petitioner asserts (Pet. 18-23) that the definition of "hazardous substance" under CERCLA, 42 U.S.C. 9601(14), should be interpreted to impose a threshold concentration requirement. According to petitioner, this Court should read into the statute "scientific and practical underpinnings which may not have been explicitly stated by Congress but are required by common sense." Pet. 19.

CERCLA defines a covered "hazardous substance" as: (A) "any substance" designated pursuant to Section 311(b)(2)(A) of the Clean Water Act, 33 U.S.C. 1321(b)(2)(A); (B) "any element, compound, mixture, solution, or substance" designated pursuant to CERCLA Section 102, 42 U.S.C. 9602; (C) "any hazardous waste having the characteristics identified under or listed" pursuant to Section 3001 of the Solid Waste Disposal Act, 42 U.S.C. 6921; (D) "any toxic pollutant" listed under Section 307(a) of the Clean Water Act, 33 U.S.C. 1317(a); (E) "any hazardous air pollutant" listed under Section 112 of the Clean Air Act, 42 U.S.C. 7412; and (F) "any imminently hazardous chemical substance or mixture" for which EPA has taken action pursuant to Section 7 of the Toxic Substances Control Act, 15 U.S.C. 2606. 42 U.S.C. 9601(14).[5]

Relying on the statute's unambiguous and unqualified language, every court of appeals that has addressed the issue has held that CERCLA's definition of "hazardous substance" contains no minimum concentration level. Pet. App. A14-A19; *United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 720-721 (2d

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[5] Petitioner concedes that its emulsion contained compounds (cadmium, chromium, copper, lead, and zinc) that are listed as "hazardous substances" under this definition. Pet. App. A22.

Cir. 1993); *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989) (as amended on rehearing).[6] As the court of appeals correctly held here, "the statute does not, on its face, impose any quantitative requirement or concentration level on the definition of 'hazardous substances.'" Pet. App. A17. CERCLA's text requires only that the "substances under consideration must simply fall within one of the designated categories." *Ibid.* Thus, petitioner's attempt to impose its own "scientific and practical" (Pet. 19) limitation on Congress's language must fail. The court of appeals' task was "to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989).[7]

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[6] See also *Eagle-Picher Indus., Inc.* v. *EPA*, 759 F.2d 922, 927 (D.C. Cir. 1985); *City of New York* v. *Exxon Corp.*, 744 F. Supp. 474, 483 (1990), adhered to on reconsideration, 766 F. Supp. 177 (S.D.N.Y. 1991); *United States* v. *Western Processing Co.*, 734 F. Supp. 930, 936 (W.D. Wash. 1990); *United States* v. *Conservation Chem. Co.*, 619 F. Supp. 162, 238 (W.D. Mo. 1985); *United States* v. *Wade*, 577 F. Supp. 1326, 1340 (E.D. Pa. 1983).

[7] For similar reasons, petitioner's contention (Pet. 24-26) that the court of appeals transgressed the bounds of Article III by enforcing the statutory language as written is without merit. The separation of powers doctrine dictates that petitioner's policy arguments be directed to Congress, not this Court. *United States* v. *Noland*, 116 S. Ct. 1524, 1528 n.3 (1996) (a party "may or may not have a valid policy argument, but it is up to Congress, not this Court, to revise the [statutory] determination if it so chooses"); see also *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 194 (1978) ("[I]ndividual appraisal[s] of the wisdom or unwisdom of a particular course consciously selected by the Congress [are] to be put aside in the process of interpreting a statute.").

b. Petitioner errs in asserting (Pet. 23) that CERCLA's definition of "hazardous substance" is unconstitutionally vague. A statute is void for vagueness only if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); see also *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) ("economic regulation is subject to a less strict vagueness test" than criminal laws). CERCLA's text plainly provides that a substance is hazardous if it has been listed under any of five specified statutory provisions. 42 U.S.C. 9601(14). The five hazardous metals in petitioner's oil emulsion are listed both under Section 307(a) of the Clean Water Act, 33 U.S.C. 1317(a); see 40 C.F.R. 401.15, and under CERCLA Section 102, 42 U.S.C. 9602; see 40 C.F.R. 302.4 (Table).

Because a substance's hazardous character is readily discernible by consulting the specified lists, the courts of appeals have agreed that CERCLA's definition is not unconstitutionally vague. Pet. App. A46 n.24; *United States* v. *Alcan Aluminum Corp.*, 755 F. Supp. 531, 539 (N.D.N.Y. 1991), aff'd in part, rev'd in part on other grounds, 990 F.2d 711 (2d Cir. 1993). This Court's review is thus not warranted.

2. Petitioner also asserts (Pet. 11-15) that the court of appeals' construction of CERCLA's causation requirement, 42 U.S.C. 9607, is incorrect and conflicts with decisions of the First and Eighth Circuits. Section 9607 provides that a generator of hazardous substances is liable for response costs if its hazardous waste is disposed of at a facility "from which there is a release, or a threatened release which causes the incurrence of response costs."

Petitioner argues that Section 9607 requires a direct causal connection between petitioner's hazardous substances and the government's incurrence of response costs. That contention does not merit further review.

a. Every court of appeals that has addressed the question has rejected petitioner's proposed construction. Pet. App. A24-A29; *Alcan*, 990 F.2d at 721; *United States* v. *Monsanto Co.*, 858 F.2d 160, 170 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).[8]

Petitioner's purported circuit conflict (Pet. 12-14) relies almost entirely on a district court decision, *Acushnet Co.* v. *Coaters Inc.*, 937 F. Supp. 988 (D. Mass. 1996), rather than contrary court of appeals authority. *Acushnet*, moreover, expressly eschews addressing the circumstances at issue in the instant case, because the plaintiffs in that case sought "a more sweeping elimination of causation as an element of the legal test for liability" than the Third Circuit adopted here and because the case involved a private plaintiff rather than an action brought by the government for its response costs. *Id.* at 998-999. In addition, the First Circuit has recognized that "strict liability was intended for releases or threatened releases which cause response costs" and that this strict liability attaches "without reference to whether [the responsible party] caused or contributed to the release or threat of release." *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1152-1153 (1989), decision clarified on other grounds,

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[8] See also *United States* v. *Bliss*, 667 F. Supp. 1298, 1309 (E.D. Mo. 1987); *Wade*, 577 F. Supp. at 1333. But see *Louisiana-Pacific Corp.* v. *ASARCO, Inc.*, 735 F. Supp. 358, 362 (W.D. Wash. 1990).

901 F.2d 3 (1st Cir. 1990); see also *O'Neil* v. *Picillo*, 883 F.2d 176, 178-179 (1st Cir. 1989) (where defendant seeks to avoid joint and several liability, it bears the burden of showing that the harm is divisible), cert. denied, 493 U.S. 1071 (1990).

Likewise, the Eighth Circuit decision cited by petitioner (Pet. 12) actually reaffirms that liability to the United States for response costs under CERCLA "is a matter of strict liability," and, "therefore, is not dependent on any showing of causation or fault." *Farmland Indus., Inc.* v. *Morrison-Quirk Grain Corp.*, 987 F.2d 1335, 1339 (1993).[9] Accordingly, the courts of appeals' decisions give no indication that the outcome of the present case would change if it were litigated in a different circuit.

b. The courts of appeals' consistent rejection of petitioner's construction, moreover, is correct. CERCLA's text imposes strict liability upon a person that arranges for disposal of a hazardous substance at a facility "from which there is a release, or a threatened release which causes the incurrence of response costs." 42 U.S.C. 9607. There is no further statutory requirement that the disposal or individual hazardous substance directly cause the release. Petitioner's contention thus cannot be reconciled with Section 9607's language. *Bailey* v. *United States*, 116 S. Ct. 501, 506 (1995) (starting point for statutory construction must be the statute's text).[10]

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[9] The Eighth Circuit went on to hold that a private party in a contribution action cannot predicate liability "solely upon section 9607(a) liability to the government, but must also prove causation." *Farmland*, 987 F.2d at 1340.

[10] The legislative history supports Section 9607's plain meaning. Congress specifically rejected an earlier draft of the Section that would have imposed liability on "any person who

c. Finally, petitioner premises its causation argument (Pet. 4, 13) on the factual claim that its emulsion "contained none of the CERCLA Hazardous Substances identified by EPA as having necessitated the Response." The district court found as a factual matter, however, that petitioner's emulsion "was commingled in the waste materials discharged into the Susquehanna River" and that the waste oils removed from the River by EPA "contained cadmium, chromium, copper, lead and zinc." Pet. App. A54. This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

3. Petitioner asserts (Pet. 17-18) that the court of appeals deviated from its own mandate regarding the standard for proving divisibility of harm, and that the court's "us[e] [of] silence to escape detection" for effectively overruling its prior decision "so far departs from the accepted and usual course of judicial proceedings that it calls for an exercise of this Court's supervisory power." Pet. 17.[11] An alleged intra-

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caused or contributed to the release or threatened release." H.R. 7020, 96th Cong., 2d Sess. § 3071(a)(1)(D) (1980), *reproduced at* 126 Cong. Rec. 26,779 (1980). See *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985). Congress deleted the causation language "precisely because it was aware of the difficulties plaintiffs would confront in the multi-generator context if required to prove such a connection." Pet. App. A27. See also *John Hancock Mutual Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993) (with respect to limiting language in a statute, the Court is "directed by those words [that Congress enacted], and not by the discarded draft").

[11] Petitioner asserted the existence of this intra-circuit conflict in its petition for rehearing and suggestion for rehearing

circuit conflict, however, does not ordinarily warrant a grant of certiorari. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974). There is no basis for departing from that rule here. This case presents a fundamental and deliberate failure of factual proof by petitioner, not an intra-circuit conflict regarding the appropriate legal standard. Petitioner elected not to present any evidence on remand to meet the standard for divisibility articulated by the court of appeals. Rather, petitioner informed the district court that "all of the issues which the Third Circuit stated should be addressed on remand such as the metals' ability to concentrate and cause a problem are irrelevant to this case." Pet. App. A65.

Petitioner also alleges (Pet. 15-17) that the court of appeals' decision conflicts with decisions of the Second and Fifth Circuits. The court of appeals held, in the initial appeal, that, "if [petitioner] proves that the emulsion did not or could not, *when mixed with other hazardous wastes*, contribute to the release and the resultant response costs," then petitioner should not be responsible for any costs. Pet. App. A37. The Second Circuit, in a companion case addressing petitioner's same emulsion, applied the identical standard. *Alcan*, 990 F.2d at 722. The Fifth Circuit has adopted a similar approach. *In re Bell Petroleum Servs., Inc. (EPA v. Sequa Corp.)*, 3 F.3d 889, 894-902 (1993).[12] This case thus presents no conflict in legal standards

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en banc. The court of appeals declined to grant rehearing. Pet. App. A105-A106.

[12] The Fifth Circuit also noted that the applicability of the Third Circuit's precise divisibility standard was not directly implicated by the facts of its case. *Bell Petroleum*, 3 F.3d at 902.

for this Court to review, and petitioner's charge that the court of appeals silently disregarded this legal standard in its judgment order does not merit further review.[13]

4. Finally, petitioner asserts (Pet. 26) that certiorari should be granted because, in applying CERCLA retroactively to petitioner's hazardous waste disposal, the court of appeals failed to apply this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). That contention does not merit further review.

First, petitioner failed to raise the retroactivity issue until after briefing was completed on the second appeal in the case. Thus, nearly seven years of litigation had elapsed, two district court grants of summary judgment had issued, one appeal was completed, and the second appeal was ready for oral argument before petitioner raised the retroactivity issue for the first time.[14] Petitioner has thus waived any retroactivity argument. See *Laborers' Int'l Union* v. *Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir.) ("An issue is waived unless a party raises it in its opening brief."), cert. denied, 513 U.S. 946 (1994); see also Fed. R. Civ. P. 12(h)(2) (defense of failure to state a claim

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[13] Petitioner also claims (Pet. 16) that the court of appeals' decision is inconsistent with a recent New York district court ruling on remand from the Second Circuit. See *United States* v. *Alcan Aluminum Corp.*, Nos. 87-CV-920, 91-CV-1132, 1996 WL 637559 (N.D.N.Y. Oct. 28, 1996). The district court's alleged departure from Second Circuit precedent, however, can be addressed by the Second Circuit. See R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 178 (7th ed. 1993).

[14] Petitioner also failed to raise the retroactivity issue at oral argument. See C.A. Oral Arg. Tr. (Aug. 7, 1996).

is waived unless made prior to the district court's disposition of the case on the merits). The court of appeals' application of that waiver rule, which parallels this Court's own practice, see *Walters* v. *Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 663 n.* (1997), does not present an issue meriting this Court's review.

Petitioner's assertion that the retroactivity question affects the court's subject matter jurisdiction, and thus may be raised at any time, is incorrect. The retroactivity of CERCLA's liability provision, 42 U.S.C. 9607, is an issue of statutory construction governing what law the court should apply, *Landgraf*, 511 U.S. at 250, not the court's power to adjudicate the case in the first instance. See *Bell* v. *Hood*, 327 U.S. 678, 684-685 (1946); cf. 42 U.S.C. 9613(b) (CERCLA's jurisdictional provision).

Nor can petitioner contend that it was unaware of the potential retroactivity claim until after *Landgraf*. The presumption against retroactive legislation that petitioner invokes "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. In any event, petitioner delayed an additional two years after *Landgraf* was decided to raise its argument.

Second, with the exception of one district court, courts consistently have held that CERCLA's liability provision, 42 U.S.C. 9607, applies retroactively.[15]

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[15] See, *e.g.*, *United States* v. *Olin Corp.*, 107 F.3d 1506, 1511-1514 (11th Cir. 1997); *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732-737 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); *Nevada ex rel. Dep't of Transp.* v. *United States*, 925 F. Supp. 691, 696 (D. Nev. 1996); *Kelley* v. *Thomas Solvent Co.*, 714 F. Supp. 1439 (W.D. Mich. 1989); *Amland Properties Corp.* v. *Aluminum Co. of America*,

Petitioner relies on *United States* v. *Olin Corp.*, 927 F. Supp. 1502 (S.D. Ala. 1996), but that decision has since been reversed by the Eleventh Circuit. *United States* v. *Olin Corp.*, 107 F.3d 1506, 1511-1514 (1997). No other court has followed the *Olin* district court.[16] Because there is no conflict in the law and because there is presently only one court of appeals decision applying *Landgraf* to CERCLA's liability provision (and in a manner contrary to petitioner's contention), review by this Court of petitioner's waived retroactivity argument is not warranted.

Third, CERCLA properly applies retroactively to petitioner's conduct. While CERCLA contains no express statement addressing the retroactive application of its cleanup provisions, the statute's language manifests a clear congressional intent to apply the

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711 F. Supp. 784, 790-791 (D.N.J. 1989); *United States* v. *Mottolo*, 695 F. Supp. 615, 621-622 (D.N.H. 1988); *United States* v. *Hooker Chems. & Plastics Corp.*, 680 F. Supp. 546, 556-558 (W.D.N.Y. 1988); *United States* v. *Dickerson*, 640 F. Supp. 448, 451-452 (D. Md. 1986); *United States* v. *Miami Drum Servs. Inc.*, No. 85-0038-CIV-ARONOVITZ, 1986 WL 15327 (S.D. Fla. Dec. 12, 1986); *United States* v. *Tyson*, No. CIV.A. 84-2663, 1986 WL 9250 (E.D. Pa. Aug. 22, 1986); *United States* v. *Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1397-1399 (D.N.H. 1985); *Conservation Chem. Co.*, 619 F. Supp. at 217-220; *United States* v. *Shell Oil Co.*, 605 F. Supp. 1064, 1072, 1075-1076 (D. Colo. 1985); *Ohio ex rel. Brown* v. *Georgeoff*, 562 F. Supp. 1300, 1302-1314 (N.D. Ohio 1983); see also *Monsanto Co.*, 858 F.2d at 173-175.

[16] See *The Ninth Ave. Remedial Group* v. *Fiberbond Corp.*, 946 F. Supp. 651, 654-664 (N.D. Ind. 1996); *Nova Chems., Inc.* v. *GAF Corp.*, 945 F. Supp. 1098, 1100-1105 (E.D. Tenn. 1996); *Alcan*, 1996 WL 637559, at *2-*5; *Cooper Indus., Inc.* v. *Agway, Inc.*, No. 92-CV-0748, 1996 WL 550128, at *6-*10 (N.D.N.Y. Sept. 23, 1996); *Gould Inc.* v. *A & M Battery & Tire Serv.*, 933 F. Supp. 431, 438 (M.D. Pa. 1996).

liability provision retroactively. Sections 9607(a)(1) and (a)(2) impose liability not only on the current owner or operator of a facility where there has been a release or threat of release, but also on "any person who at the time of disposal of any hazardous substances owned or operated any facility." The language thus reveals Congress's intent to reach persons engaged in hazardous waste disposal prior to CERCLA's enactment. The phrase "at the time of disposal" is clear on its face and is not limited in time. See *Olin*, 107 F.3d at 1513; *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732 (8th Cir. 1986), cert. deined, 484 U.S. 848 (1987).

Likewise, Section 9607(a)(3) imposes liability on "any person who * * * arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances." Section 9607(a)(4) imposes liability on "any person who * * * accepted any hazardous substances for transport to disposal or treatment facilities." Congress's use of the past tense for liability, coupled with Section 9607(a)(2)'s language indicating that the resulting disposal is not time-limited, further evidences Congress's intent to impose liability retroactively. See also 42 U.S.C. 9603(c) (within 180 days of CERCLA's passage, "any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances * * * are or have been stored, treated, or disposed of," shall notify EPA of the existence of such facility).[17]

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[17] In contrast to the cost recovery provisions of Section 9607(a), Congress subjected liability for natural resource dam-

CERCLA's legislative history also reveals Congress's intent to have CERCLA's liability provision apply retroactively. See H.R. Rep. No. 1016, 96th Cong., 2d Sess., Pt. I, at 17 (1980) (identifying existing, notorious dump sites, such as Love Canal, to which CERCLA will apply); S. Rep. No. 848, 96th Cong., 2d Sess. 2, 13 (1980) (statute targets "[t]he legacy of past haphazard disposal of chemical wastes," and its goal is "assuring that those who caused chemical harm bear the costs of that harm"); see also *The Ninth Ave. Remedial Group* v. *Fiberbond Corp.*, 946 F. Supp. 651, 660-661 (N.D. Ind. 1996) (quoting floor statements).[18]

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ages to an express limitation on retroactivity. 42 U.S.C. 9607(f).

[18] The response brief filed by three settling defendants in this action, Beazer Materials and Services, Inc., et al. (Beazer), advances an elaborate theory as to the compromise that resulted in the passage of CERCLA in the Senate (Resp. Br. 17-24). That theory, however, would require the Court to draw inference after inference about purported legislative trade-offs that no court, in nearly 12 years of CERCLA retroactivity litigation, has been willing to draw. See *Olin*, 107 F.3d at 1515 n.20 (Olin's legislative history trade-off arguments "contain what can be described, most charitably, as misstatements of the record"); *Northeastern Pharmaceutical*, 810 F.2d at 736-737; *Ninth Avenue*, 946 F. Supp. at 660-664; *Nevada*, 925 F. Supp. at 695-696; *Shell Oil*, 605 F. Supp. at 1077-1079. Similarly, Beazer's assertion that the Senate compromise bill changed the nature of liability from retrospective to purely prospective overlooks that the cleanup liability provisions from S. 1480 were directly incorporated into the compromise bill. Finally, the fact that the definition of liability under Section 9601(32) refers to the standard of liability under Section 311 of the Clean Water Act, 33 U.S.C. 1321, has no bearing on the question of retroactive liability. Section 9601(32) does not alter

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
DAVID C. SHILTON
MICHAEL J. MCNULTY
JOHN T. STAHR
Attorneys

MAY 1997

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the four categories of liable persons under Section 9607(a), or address retroactive liability at all.